Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Lindsey K. Springer,

Petitioner,

v.

THE INFINITY GROUP CO.,;
ROBERT F. SANVILLE, individually
and as Trustee for Infinity Group Co.,

Respondents.

APPENDIX A

ON WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Lindsey K. Springer
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Tulsa, Oklahoma, 74135
918-748-5539

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LINDSEY K. SPRINGER, d/b/a Bondage Breakers Ministries, Plaintiff,	)
v.	) Case No. 98-CV-0299-K(E)
THE INFINITY GROUP COMPANY and ROBERT F. SANVILLE, individually and as Trustee of The Infinity Group Company, Defendants.	)

REPORT AND RECOMMENDATION

Plaintiff Lindsey K. Springer initiated this action alleging libel and slander pursuant to Oklahoma Stat. 12, §§ 1441 and 1442(1998). This Court has referred to the undersigned for Report and Recommendation the Motion of Robert F. Sanville, Court-Appointed Trustee, The Infinity Group Company, to Dismiss Plaintiff's Complaint (Docket # 2). Defendant Robert F. Sanville ("Trustee") seeks dismissal under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction and

Fed.R.Civ.P.12(b)(6) for failure to state a claim upon which relief can be granted. The undersigned recommends that the motion to dismiss be **GRANTED.**

I. STANDARD OF REVIEW

A motion to dismiss is properly granted when it appears beyond doubt that a plaintiff could prove no set of facts entitling him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L. Ed. 2d 80(1957); Huxall v. First State Bank, 842 F.2d 249, 251(10th Cir. 1988). The complaint is construed in favor of plaintiff and all material allegations made therein are accepted as true. Warth v. Seldin, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed. 2d 343(1975); American Mining Congress v. Thomas, 772 F.2d 640(10th Cir. 1985), cert denied, Kepford v. Thomas 476 U.S. 1158, 106 S.Ct. 2276, 90 L. Ed. 2d 718(1986).

II. FACTS

The undersigned accepts the facts as

plaintiff has presented them. In addition, the undersigned proposes findings that on August 26, 1997, a civil enforcement action was brought in the United States District Court for the Eastern District of Pennsylvania (hereinafter the "Pennsylvania Eastern District") by the Securities and Exchange Commission ("SEC") against The Infinity Group Company("TIGC"), Geoffrey Benson, and Geoffrey O'Connor. The action alleged interstate securities violations. Several relief defendants were named, including Lindsey K. Springer. The Pennsylvania Eastern District, in an order dated September 5, 1997, appointed Robert F. Sanville as Trustee, directing that he was "empowered to assume control over TIGC's assets and to conduct an accounting of its assets and investor proceeds." Memorandum of Law in Support of Motion of Robert F. Sanville, Court-Appointed Trustee, The Infinity Group Company, to Dismiss

Plaintiff's Complaint (Docket # 3), Exhibit A, at 1. On February 6, 1998, the Pennsylvania Eastern District issued an Order for a Final Injunction, Disgorgement, and Other Relief. The court concluded that TIGC, Geoffrey Benson, and Geoffrey O'Connor had violated federal securities laws. Id.,Exh. B.

In an accompanying memorandum, the court ordered Mr. Springer d/b/a Bondage Breakers Ministries to disgorge $ 1.265 million which the Court had determined originated as funds unlawfully obtained from TIGC investors by TIGC and which Mr. Springer had received from TIGC without consideration. Id., Exhibit C, at 16. The Court, in the February 6, 1998 memorandum, stated

> Undoubtedly TIGC's members had faith in TIGC. They certainly had hope that its extravagant guarantees would be fulfilled. But TIGC was no charity--investors were defrauded for defendants' and relief defendants' gain. For that, defendants must answer under securities laws.

Id., Exhibit C, at 3-4(emphasis added).

In the February 6, 1998 order, the court directed Mr. Sanville to continue as Trustee and specifically ordered him to, "As soon as practicable, notify all existing TIGC investors of the terms or this Order [and] initiate proof of claim procedures in order to determine the Trust's final obligations to its investors." Id., Exhibit B, at 5-6. Mr. Sanville sent a letter to some 10,000 persons believed to have been TIGC investors. The letter began; It is my unpleasant duty to inform you that the court has found that you were the victim of a fraud." Id., Exhibit D, at 1. The letter also stated

> The Court made the following findings as part of its decision:
>
> ....
>
> 2. "Investors were defrauded for defendants' (TIGC, Benson and O'Connor) and relief defendants' (Lindsey K. Springer, d/b/a Bondage Breaker Ministries, Susan L. Benson, JGS Trust, SLB Charitable Trust, and Futures Holding Company) personal gain".

Id. Plaintiff claims that these statements constitute libel and slander.

III. REVIEW

A. Jurisdiction

Trustee challenges this Court's jurisdiction over the subject matter of the claim, arguing that "As a court-appointed trustee, Sanville may not be sued in a court other than that which appointed him except under limited circumstances not present here." Id., at 5. The undersigned agrees.

"It is well settled that leave of the appointing forum must be obtained by any party wishing to institute an action in a non-appointing forum against a trustee, for acts done int he trustee's official capacity and within the trustee's authority as an officer of the court." In re DeLorean Motor Company v. Weitzman, 991 F.2d 1236, 1240(6th Cir. 1993); Barton v. Barbour, 104 U.S. 126, 26 L.Ed. 672(1881). The Trustee's dissemination of a letter to investors was an act done in his official capacity and within his authority as an officer of the court.

There is a statutory limited exception to the Barton and DeLorean holdings:

> Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property.

28 U.S.C. § 959. Here, Section 959 does not excuse plaintiff's failure to seek leave of the Pennsylvania Eastern District because the dissemination of a letter to investors was not an act done in carrying on business connected with the property over which Sanville was appointed Trustee. The undersigned recommends that this Court find and conclude that it lacks jurisdiction over plaintiff's claim and, therefore, it must be dismissed in accord with Fed.R.Civ.P. 12(b)(1).

A. Quasi-Judicial Immunity

In the alternative, plaintiff has failed to state a claim upon which relief may be granted. The Trustee asserts that he is

absolutely immune form suite under the doctrine of quasi-judicial immunity. The application of quasi-judicial immunity depends on whether a challenged action was made pursuant to a function integral to the judicial process. "[I]mmunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." Forrester v. White, 484 U.S. 219, 227, 108 S.Ct. 538, 544, 98 L. Ed. 2d 555(1988). One of many quasi-judicial functions afforded absolute immunity is the power of court-appointed trustees and receivers to perform those actions necessary to their official duties. See Valdez v. City and County of Denver, 878 F.2d 1285, 1287-1288(10th Cir. 1989)(collecting cases which hold that quasi-judicial immunity applies to particular function); T & W Inv. Co. Inc. Kurtz, 588 F.2d 801, 802-803(10th Cir. 1978)(holding that a receiver who is sued for civil rights violations is a court officer

who shares the judge's immunity to the extent he carried out the orders of his appointing judge).

Here, the Trustee was appointed by the Pennsylvania Eastern District and directed by that court to notify investors of the terms of its February 6, 1998 order. In so doing, the Trustee included a quotation from the order that "Investors were defrauded for defendants' and relief defendants' personal gain." Plaintiff complains that the Trustee exceeded his authority when he edited the quote and inserted "(TIGC, Benson and O'Connor)" after "defendants'" and "(Lindsey K. Springer, d/b/a Bondage Breakers Ministries, Susan L. Benson, JGS Trust, SLB Charitable Trust, and Futures Holding Company)" after "relief defendants'." Also, plaintiff complains that his name-given in full-and the name of his ministry were placed first within the parenthetical insert. Contrary to the assertions of plaintiff, what

little editing of the quote that was done by the Trustee was (1) accurate, (2) merely for clarification, and (3) did not in any way alter the meaning of the February 6, 1998 order. Nor can anything be made of placing plaintiff's name first within the parenthetical insert. One of the relief defendants' names had to be listed first and the fact that it happened to be plaintiffs does not amount to an overstepping of authority.

The Trustee's letter was properly within his authority as granted pursuant to the order of the Pennsylvania Eastern District. Therefore, the undersigned recommends a finding that the Trustee is absolutely immune from suit for any libel and slander arising from dissemination of the letter.

Moreover, both Pennsylvania and Oklahoma law exempt from their libel and slander statutes certain privileged communication including communication made in any judicial

proceeding or other proceeding authorized by law, in discharge of an official duty, or by a fair and true report of a judicial proceeding.1 While it is not necessary to reach the issue of privilege, the undersigned notes that it appears that the Trustee's letter sent in the course of the proper discharge of his official duties and the letter contained a fair and true report of a judicial proceeding. Thus, the letter would be a privileged communication and exempt from Oklahoma's and Pennsylvania's libel and slander laws.

The Undersigned recommends, in the alternative, that this Court find and conclude that plaintiff's complaint fails to state a claim upon which relief may be granted and, therefore, must be dismissed in accord with Fed.R.Civ.P. 12(b)(6).

IV. CONCLUSION

Upon careful review of the complaint and the parties' briefs, for the foregoing

reasons, the undersigned recommends that the Motion of Robert F. Sanville, Court-Appointed Trustee, The Infinity Group Company, to Dismiss Plaintiff's Complaint (Docket # 2) be **GRANTED**.

V. OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his review of the record, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must do so within ten days after being served with a copy of the Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). Failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and

Recommendation that are accepted or adopted by the District Court. See Ayala v. United States, 980 F.2d 1342(10th Cir. 1992); Niehaus v. Kansas Bar Ass'n, 793 F.2d 1159, 1164-65(10th Cir. 1986)(Superseded by rule on grounds not relevant to holding on waiver of right to appeal).

Dated this 24th day of July, 1998.

Claire V. Eagan
United States Magistrate Judge

1. Although plaintiff sued under Oklahoma law, this Court would have to apply choice of law considerations to a determination of whether Oklahoma or Pennsylvania law applies. However the undersigned recommends that the Court not reach that issue, as the law of both states recognizes that privileged communication exception. See Okla. Stat. tit 12 § 1443; Joplin v. Southwestern Bell Telephone co., 753 F. 2d 808, 810,(10th Cir. 1983); Kirschstein v. Haynes, 788 P. 2d 941(Okla. 1990); Lindner v. Mollan, 544 Pa 487, 490, 677 A 2d. 1194, 1195 (Pa. 1996); Kemper v. Fort, 219 Pa. 85, 67 A. 991(Pa 1907).

The Infinity Group Company Trust
Robert F. Sanville, Trustee
P.O. Box 717
Abington, PA 19001-0717
215-885-7930

March 6, 1998.

To persons who may have invested in
The Infinity Group Company ("TIGC")

It is my unpleasant duty to inform you that the court has found that you were the victim of a fraud. On February 6, 1998, after a four-day final injunction hearing held in Philadelphia, PA, the Honorable Stewart Dalzell, United States district Judge for the Eastern District of Pennsylvania, found TIGC, Geoffrey P. Benson("Benson") and Geoffrey J. O'Connor ("O'Connor") guilty of violating various provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934.

The Court made the following findings as part of its decision:

1. "The Bensons used TIGC as their personal checking account".

2. "Investors were defrauded for defendants' (TIGC, Benson and O'Connor)

and relief defendants'(Lindsey K. Springer, d/b/a Bondage Breakers Ministries, Susan L. Benson, JGS Trust, SLB Charitable Trust, and Futures Holding Company) personal gain".

3. "Virtually every material statement TIGC made was false".

4. "Of the more that $ 24 million raised from investors, only approximately 48% went into anything that could be characterized as an investment. From the $ 11.8 million that went into purported investments the evidence is uncontroverted that TIGC earned not one cent of interest, dividend, or return of any kind".

5. "Early investors who requested refunds were not paid from investment process, but rather from money received from later investors. In the time-dishonored tradition of Charles Ponzi, TIGC substituted new investors' money for real investment return on old investors funds".

6. "At best, defendants' investment enterprise began as a reckless financial enterprise, and evolved into an intentional scheme to defraud investors of their money when the money became necessary to prevent TIGC's collapse. At worst, TIGC's Asset Enhancement Program was from its inception, a Ponzi Scheme, calculated to bilk investors".

The Court issued the following as part of its decision:

1. Permanently enjoined TIGC, Benson

and O'Connor from violating certain provisions of the federal securities laws. this means that TIGC is permanently closed down.

2. Continued my appointment as"trustee for all funds, assets, choses in action, or other property belonging to, in the possession of, beneficially owned by or in the control of TIGC".

3. Required TIGC, Benson and O'Connor, Futures Holding Company, SLB Charitable Trust, Susan L. Benson, JGS Trust, Lindsey K. Springer and Bondage Breakers Ministries to disgorge(or turn over) to me "funds or assets now held by them, under their control or over which they exercise actual or apparent control, in whatever form such funds or other assets may now exist". The amounts of the disgorgements are $ 24, 597.386.29 jointly and severally from TIGC, Benson and O'Connor; $ 2,488, 515.94 from SLB Charitable Trust and Susan L. Benson; $ 1,425,900.00 from Future

Holding Company and Susan L. Benson; 125,000.00 from JGS Trust and Susan L. Benson; and $ 1,265,000.00 from Lindsey K. Springer and Bondage Breakers Ministries.

WHAT AM I DOING NOW?

As Trustee, I have been evaluating what claims TIGC has against others. In addition to pursuing the disgorgment order discussed above, I will pursue those claims that I believe will be in the best interest of TIGC investors. These include; actions against individuals and entities who sold TIGC worthless and fraudulent investments (such as purported "International Trading programs" and "Private Placements"); Individuals and entities who, in one form or another, assisted in the perpetuation of this fraudulent scheme; and individuals and entities who benefitted from the receipt of funds which were fraudulently obtained.

The assets which are held and which will be recovered by the Trust, lest the expenses

of the Trust, will be distributed to all TIGC investors who submit valid proof of claims. The money will be distributed on a pro-rate basis, or in proportion to the amount invested in TIGC, less any amount received form TIGC. Depending on the success of our recover efforts, there may be more than one distribution. If I were to make a distribution at this time it would be approximately 25 cents on the dollar. (Someone who invested $ 1,200 would received approximately $ 300.)

WHAT MUST YOU DO NOW?

The records kept by TIGC concerning investors' funds were poor. The records simply do not provide the reliable information necessary to identify the investors entitled to refunds. For this reason, I am asking you to complete the enclosed "Proof of Claim form. The form must be completed in its entirety and returned to me, with appropriate proof of your

investment, by April 30, 1998. A return is enclosed. Incomplete or unsubstantiated claims cannot be processed. ONLY THOSE INVESTORS WHO MAIL A COMPLETE VALID PROOF OF CLAIM BY APRIL 30, 1998 WILL BE ENTITLED TO A DISTRIBUTION FROM THE TRUST.

A PERSONAL NOT FROM THE TRUSTEE

The brochures, newsletters, member manuals and faxes of TIGC were replete with reassuring slogans such as "100% guaranteed", "our investments are real", "the truth will set you free", ect. Additionally, revered and patriotic symbols such as the Statute of Liberty, Scales of Justice and American Flag were inserted throughout the literature. Unfortunately, as the Court found based on evidence uncontradicted by Geoffrey and Susan Benson, Geoffrey O'Connon and Lindsey Springer, these were part of schemes to perpetuate a fraud. The documents obtained from TIGC show a portion of your funds were used to foster a lavish lifestyle of the

defendants and relief defendants. None of TIGC's investments ever produced even one cent of return; in many cases the entities themselves are now shut down or out of business. The chance of recovery of even the principal are slim. If you are angry, it is understandable. My function is to make you as whole as possible. I intend to do every thing I can to recover as much of your money as I can. Your patience and cooperation are greatly appreciated. Thank you.

Very Truly Yours

ROBERT F. SANVILLE, TRUSTEE

Enclosure: Proof of Claim Form

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Lindsey K. Springer,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	No. C-299-K
The Infinity Group Co.	)	
and Robert F. Sanville.	)	
	)	
Defendant.	)	

O R D E R

On July 24, 1998, Magistrate Judge Eagan filed a report and recommendation, recommending that this Court grant the motion of the defendants to dismiss this action. The plaintiff has timely filed an objection. The factual background is set forth in the Report and Recommendation. In summary, the plaintiff brings this action for libel and slander under Oklahoma law against the Infinity Group Company ("TIGC") and Robert F. Sanville ("Sanville"), who was appointed TIGC's trustee by the United States District Court for the Eastern District of Pennsylvania.

In that Court, a civil enforcement action had been brought by the Securities and Exchange Commission ("SEC") against TIGC and others alleging interstate securities violations. Lindsey K. Springer, the present plaintiff, was named as a "relief defendant" in the Pennsylvania action. On February 6, 1998, the Pennsylvania court issued an Order for Final Injunction, Disgorgment and Other Relief, having found violations of federal securities laws by TIGC and defendants Geoffrey Benson and Geoffrey O'Connor.

In an accompanying memorandum, the court ordered Mr. Springer to disgorge $1.265 million which the court had determined originated as funds unlawfully obtained from TIGC investors by TIGC and which Mr. Springer had received from TIGC without consideration. In the February 6, 1998 order, the court directed Mr. Sanville to continue as Trustee and specifically ordered him to "As soon as practicable, notify all existing TIGC

investors of the terms of this Order [and] initiate proof of claim procedures in order to determine the Trust's final obligations to its investors." Mr. Sanville sent a letter to some 10,000 persons believed to have been TIGC investors. The letter stated in pertinent part that investors were defrauded for "defendants' (TIGC, Benson and O'Connor) and relief defendants' (Lindsey K. Springer, d/b/a/Bondage Breakers Ministries, Susan L. Benson, JGS Trust, SLB Charitable Trust, and Futures Holding Company) personal gain." Plaintiff herein claims this statement constitutes libel and slander.

The Magistrate Judge recommended dismissal of this action on two grounds. First, this Court lacks subject matter jurisdiction because the trustee's dissemination of the letter to investors was an act done in his official capacity and within his authority as an officer of the Court; therefore, Mr Saville may only be

sued for those actions in the court which appointed him, unless leave of the appointing forum is granted. The Magistrate Judge noted that the language of the letter accurately reflected the findings of the Pennsylvania court in its Order. The slight editing done by the Trustee, and the placing of Mr. Springer's name first in the list of relief defendants, the Magistrate Judge found insufficient to alter the general principle. This Court agrees.

Second, the Magistrate Judge found that the complaint fails to state a claim for relief because court-appointed trustees are entitled to quasi-judicial immunity. Again, this Court agrees.

It is the Order of the Court that the objection of the plaintiff(#25) to the Report and Recommendation of the Magistrate Judge is hereby overruled. The motion to dismiss of defendant Sanville (#2) is hereby GRANTED. Because this ruling requires the dismissal of

the Infinity Group Company as well, this action is dismissed in its entirety.

It is the further order of the Court that all other pending motions are declared moot, with two exceptions. Each side has moved for sanctions against the other. Defendant seeks sanctions against plaintiff for filing a motion for temporary restraining order and plaintiff seeks sanctions against defendants' local counsel, because he signed a motion actually prepared by defendants' Pennsylvania counsel. The Court finds no conduct meriting Rule 11 sanctions in this case. Accordingly, motions # 17 and # 19 are hereby DENIED.

Ordered this 24 day of August, 1998.

Terry C. Kern, Chief
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDSEY K. SPRINGER, d/b/a Bondage Breakers Ministries,	)	No. 98-5182 (D.C. No. 98-CV-299-K
Plaintiff-Appellant,	)	
v.	)	
THE INFINITY GROUP CO.; ROBERT F. SANVILLE, individually and as Trustee for Infinity Group.,	)	
Defendants-Appellees.	)	

ORDER AND JUDGMENT

Before
PORFILIO, BARRET, and HENRY, Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

In August 1997, the Securities and Exchange Commission brought a civil enforcement action for securities violations

in the United States District Court for the Eastern District of Pennsylvania against The Infinity Group Company (TIGC), Geoffrey Benson and Geoffrey O'Conner, and named several "relief defendants," including Lindsey K. Springer. The court appointed Robert F. Sanville as trustee for TIGC and directed him to assume control over TIGC's assets and conduct an accounting of its assets and investor proceeds. In February 1998, the court issued its Order for Final Injunction, Disgorgement, and Other Relief, concluding that TIGC, Benson and O.Connor had violated federal securities law and ordering relief defendant Springer to disgorge $ 1.265 million. In its accompanying memorandum, which the court stated constituted in part its findings of fact and conclusions of law, the court held that TIGC had "defrauded [investors] for defendants' and relief defendants' gain," R.Vol. IDoc.3, Ex C at 3-4, and that Springer's $ 1.265 million was

"TIGC' unlawfully-obtained investor funds, for which [Springer] received no consideration at all and to which he has no legitimate claim," id at 16. In its order the court directed Sanville to notify all existing TIGC investors of the terms of the Court's order and initiate claim procedures.

Sanville sent a letter to potential TIGC investors explaining that "[i]t is my unpleasant duty to inform you that the court has found that you were the victim of a fraud." Id., Ex. D at 1 The letter further stated that "[t]he Court made the following findings as part of its decision...'Investors were defrauded for defendants' (TIGC, Benson and O'Connor) and relief defendants' (Lindsey K. Springer, d/b/a Bondage Breakers Ministries, Susan L. Benson, JGS Trust, SLB Charitable Trust, and Futures Holding Company) personal gain.'" Id.

Claiming these statements were libelous and slanderous, Springer brought this

diversity action in the Northern District of Oklahoma against TIGC and Sanville. Adopting the magistrate Judge's report and recommendation, the district court granted Sanville's motion to dismiss under Fed.R.Civ.Pr. 12(b)(1) and (6). The court held that under the doctrine of Barton v. Barbour, 104 U.S. 126(1881), because Springer was suing Sanville for acts Sanville did in his official capacity as trustee, he needed leave to proceed from the appointing court, i.e., the Eastern District of Pennsylvania, which he did not have. See Allard v. Weitzman (In re DeLorean Motor Co.), 991 F.2d 1236, 1240 (6th Cir. 1993). The court also held that Springer's action did not fall within the exception to the Barton doctrine provided by 28 U.S.C. § 959(a) because Sanville's acts were not performed in carrying out TIGC's business. See In re DeLorean Motor Co.,, 991 F.2d at 1240-41. The Court concluded that it therefore lacked

jurisdiction.

Alternatively, the court held that Sanville was entitled to quasi-judicial immunity because the acts of which Springer complains were taken in his capacity as court-appointed trustee and at the direction of the Eastern District, and that Springer therefore failed to state a claim upon which relief could be granted. **See Valdez v. City & County of Denver**, 878 F.2d 1285, 1287-90(10th Cir. 1989). Springer appeals.

We review the district court's dismissal under Rules 12(b)(1) and (6) de novo. See **Painter v. Shalala**, 97 F.3d 1351, 1355 (10th Cir. 1996); **Chemical Weapons Working Group, Inc. v. United States Dep't of the Army**, 111 F.3d 1485, 1490(10th Cir. 1997). We have reviewed the record and fully considered Springer's arguments on appeal and find his arguments unpersuasive. We affirm the district court's judgement for the reasons stated in its order adopting the magistrate

judge's report and recommendation.

AFFIRMED

Entered for the Court

John C. Porfilio
Circuit Judge.